

Restrepo (Migration) [2021] AATA 2558 (20 May 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Martha Lucia Restrepo Master Jose Miguel Ruiz Restrepo
CASE NUMBER:	1806445
HOME AFFAIRS REFERENCE(S):	BCC2017/100421
MEMBER:	Hugh Sanderson
DATE:	20 May 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2) of Schedule 2 to the Regulations; and • cl 820.221(1) of Schedule 2 to the Regulations.

Statement made on 20 May 2021 at 2:57pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – reconciled their relationship – high degree of companionship and emotional support – genuine married relationship at the time of application –decision under review remitted

LEGISLATION

Migration Act 1958, s 5F, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The first named applicant (the applicant) applied for the visa on 9 January 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.211 because the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

4. The applicant is a citizen of Colombia and is currently 54 years old. The sponsor of the applicant is José Miguel Ruiz Restrepo. He was born in Colombia and is currently 65 years old. He has lived in Australia since 1999 and is now an Australian citizen.
5. The parties have known each other since 1980. They were married in Colombia on 6 December 1982. They had two children, Hernan who is currently 37 years old and Otalvaro who is currently 33 years old. They claim that their relationship ended in 1991 when they separated. They were never divorced and their marriage remains valid. The sponsor commenced a de facto relationship with Sandra Vera in 1993. That relationship ended in 2003 when they separated. The applicant commenced a de facto relationship with Jorge Castano in 1999. The second named applicant is the child of that relationship. He is currently 21 years old. Mr Castano died in 2004.
6. The sponsor first entered Australia in 1999 with their son Hernan. Otalvaro has lived in Australia since 2005 after being granted a Child visa. It was claimed that the parties kept in touch with each other for the sake of their two children. Their son, Hernan, was diagnosed with Type I diabetes in 2011. It was claimed that in 2014 the parties decided to reconcile their relationship. As the applicant's youngest son was still attending school, she could not travel to Australia. Hernan travelled to Colombia in September 2014 and lived with his mother before returning to Australia in November 2015. The sponsor travelled to Colombia in January 2016 and the parties claim they recommenced living with each other in the home of the applicant. It was claimed that they initially planned to live together in Colombia. The sponsor remained in Colombia until 1 December 2016. This has been the only time the sponsor has travelled out of Australia since arriving in 1999.
7. The applicant applied for and was granted Visitor visas for herself and her son as she wished to be with Hernan who was receiving treatment in Australia. The applicant travelled to Australia on 4 August 2016. The applicant's son did not travel to Australia until 31 December 2016. In the Visitor visa application, it was claimed that the applicant travelled to Australia to spend time with her son who was ill. The applicants were granted further Visitor visas to extend the time they were allowed to spend in Australia. In her applications for the Visitor visa, the applicant declared her marital status as "widowed". Upon the return of the sponsor, the parties claimed that they believed it was better they stay in Australia to be close

to their children and the application was made. The parties claim they have been living together since then in Australia.

8. The applicant provided various documents in support of the application. This included the following:

- Evidence the parties had opened a joint bank account;
- Various accounts in the names of the parties individually with some addressed to the home the parties claimed to share; and
- Statements by friends, including the sponsor's ex-partner, claiming they believed the relationship was genuine and continuing.

9. The delegate who considered the application noted the following issues:

- Although providing evidence that they had opened a joint bank account, no details from this account were provided;
- The receipts provided were in the individual names of the parties and, although addressed to the home the parties claimed to share, they did not indicate any pooling of financial resources or sharing of expenses;
- There was no evidence that the parties had ever shared a home together in Colombia in 2016 as they had claimed;
- There was little credible evidence that the parties had established a household together in Australia;
- The statements provided by friends did not provide clear and credible evidence that the parties were in a married relationship;
- There was little credible evidence to show that the parties had presented themselves as being in a married relationship;
- When applying for the Visitor visa, the applicant stated she was "widowed" and did not disclose any relationship with the sponsor;
- There was no evidence of the parties maintaining any communication with each other when the parties were living in separate countries;
- Although the parties have referred to the fact that their son is terminally ill and their desire to care for him, there was no information which would indicate the parties had truly reconciled their relationship after many years of separation; and
- It appeared the parties had contrived their relationship to enable the applicant to reside permanently in Australia.

10. Taking these matters into account, the delegate was not satisfied the parties were in a genuine and continuing relationship and therefore the applicant was not the spouse, as defined in s.5F of the Act, of the sponsoring partner. The delegate found the applicant did not meet the criteria in cl 820.211 and refused the application. As the applicant did not meet the criteria for the grant of the visa, the second named applicant was not a member of the family unit of a person who met the primary criteria and his application was refused.

Information to the Tribunal

11. The applicant provided further documents to the Tribunal including the following:
 - Health insurance certificate from Colombia dated 28 February 2018 noting that the applicant had nominated as her partner the sponsor commencing on 1 April 2016;
 - A letter from the applicant's doctor in Colombia stating that her husband was also a patient of his until November 2016;
 - Statements from friends in Colombia and in Australia claiming that they were aware the parties had reconciled and they believed their relationship was genuine and continuing;
 - Statements from relatives of the parties, including their children, claiming the relationship is genuine;
 - Numerous photos of the parties together at various social events in Australia and Colombia;
 - Joint bank account of the parties from Colombia; and
 - Tax returns of the parties showing themselves as being married to each other;
12. The applicants appeared before the Tribunal on MS Teams video on 20 May 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish and English languages.
13. The parties provided consisted information as to various aspects of their relationship. This included details of their work, the assets they owned, the activities of their children and the contact that José has with his paternal family in Colombia. The parties provided the evidence in a full and frank manner.
14. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

16. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
17. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together,

or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 6 December 1982 in Colombia. Although the parties separated and both entered into relationships with other people, they have never been divorced and the marriage between the parties remains valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

19. The parties do not own any property in Australia, however, the applicant owns a number of properties in Colombia. Arrangements have been made for some of these properties to be registered in the names of the sponsor and José. The parties provided consisted information as to the management of the investment properties in Colombia and the investment of the income from those properties in Colombia. The parties provided consisted information as to their plans for these properties should the applicant be able to live permanently in Australia.
20. The parties have commenced a business together. The name of the business indicates that the parties are involved in this business together. The parties have provided photos and other details showing that they are working in the business together. The business is officially registered in the sole name of the sponsor as the parties did not know if the applicant on a Bridging visa was able to be registered as a business owner in Australia. Steps are being taken now with the parties' accountant to have the business put in the name of both parties. The parties derive their income from this business and use the income they derive from the business to meet their day-to-day household expenses.
21. The Tribunal finds that the parties financial arrangements show that they are pooling their financial resources and sharing day-to-day household expenses. The Tribunal finds the financial aspects of the relationship supports a finding that the parties live together in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Household

22. After the parties reconciled their relationship the sponsor moved to live with the applicant in Colombia in the home she was living in there. Evidence has been provided of the parties living together in Colombia including correspondence addressed to them both in that home. After arriving in Australia, the applicant was living in the home that had previously been rented by the sponsor and in which their children were residing. Since the sponsor returned to Australia in December 2016 the parties have been living together in this house with their children.
23. Correspondence addressed to the parties has been provided to the Tribunal. The parties provided consisted information as to the arrangements within their household, including details of the activities of their children and the arrangements for maintaining the household.

24. The Tribunal is satisfied that the parties have been living together, both in Colombia and in Australia, after they reconciled their relationship and the sponsor travelled to Colombia in January 2016. They continue to provide care and assistance for their children, despite the fact that all the children are now aged over 18 years old. The Tribunal finds the nature of the household the parties have established supports a finding that they are living together in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Social aspects

25. The parties provided numerous statements from friends and relatives attesting to the fact that they represent themselves as being married to each other and that their relationship is recognised as genuine. The parties have undertaken numerous social activities together, including attending family gatherings, church meetings, and other social events. The photos provided by the parties show their participating together in numerous social activities. This includes social activities both in Australia and in Colombia.
26. The Tribunal is satisfied that the parties represent themselves as being married and that their relationship is recognised as genuine by their friends and family. The Tribunal finds the social aspects of the relationship supports a finding that the parties live together in a genuine and continuing relationship and that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Commitment to each other

27. The parties were married in 1982 in Colombia. They have never divorced and they remain married to each other. They separated in 1991 and both parties re-partnered with the applicant having a child of her relationship with her new partner. Her relationship ended with the death of her partner in 2004.
28. The parties continued communicating with each other due to the fact that they have two children of their relationship. Their relationship and dependence upon each other grew with the fact that one of their children was diagnosed as suffering a medical condition. Their realisation that they wished to live together was put into place in January 2016 with the sponsor moving to live with the applicant in Colombia. Due to their son's medical condition, however, they both returned to Australia at the end of that year and have lived in Australia since then. They have now been living together since reconciling for more than five years.
29. Over the course of their relationship since they reconciled, the parties have provided each other high degree of companionship and emotional support. They have commenced a business together. They have provided significant emotional support in the care of Hernan and the assistance he requires as a result of his medical condition. The fact that they have commenced a business together shows they consider their relationship is long-term. They have provided information as to their plans for the future together living in Australia.
30. The Tribunal finds the commitment the parties have shown to each other supports a finding that the parties are living together in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Overall assessment

31. When the applicant first arrived in Australia on a Visitor visa, she stated that her marital status was widowed. This is not surprising as she was travelling with some urgency to be able to be with her son who getting treatment for his medical condition and she was applying for the visa with her son from her relationship with her partner who had died. The Tribunal

accepts that it was not the intention of the applicant to provide false or misleading information in stating that she was widowed, even though she remained married to the sponsor and having reconciled her relationship with him after her subsequent partner had died.

32. The parties have now provided extensive information in support of the application. This includes details of their financial affairs in Australia and Colombia, the arrangements of their household, their social activities and details of the support they give to each other and all their children. The Tribunal finds that the weight of evidence supports a finding that the parties live together in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
33. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the applicant meets cl 820.211(2)(a) and continues to meet this criterion at the time of this decision.
34. At the time of the application the applicant was sponsored by her spouse who was over the age of 18. She continues to be sponsored by him. Accordingly, the applicant meets cl 820.211(2)(c) at the time of the application and continues to meet this criterion at the time of this decision. At the time of the application the applicant held a substantive visa and accordingly the criteria in cl 820.211(2)(d) is not relevant.
35. For the above reasons, the Tribunal finds the applicant meets the criteria in cl 820.211(2).
36. As the applicant continues to meet the requirements of cl 820.211(2) at the time of this decision, the applicant meets the criteria in cl 820.221(1).
37. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
38. As the first named applicant meets these criteria for the grant of the visa, the application for the second named visa applicant should now be reconsidered in full. It is noted the second named visa applicant remains living with the visa applicant and the review applicant and continues to be a student.

DECISION

39. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211(2) of Schedule 2 to the Regulations; and
 - cl 820.221(1) of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).